IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1322

CAROLYN BRADLEY, *et al.*,

Petitioners,

—v.—

THE SCHOOL BOARD OF THE CITY OF RICHMOND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 42(2) of the Rules of this Court, the Lawyers' Committee for Civil Rights Under Law has requested and received the consent of the parties to this action to its filing a brief as *amicus curiae* in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

INTEREST OF THE *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law is a nonprofit corporation which was organized at the request of President Kennedy to involve private lawyers throughout the nation in the struggle to assure equal civil rights for all Americans. The Committtee's membership includes two former Attorneys General, twelve past Presidents of the American Bar Association, and a number of law school deans, as well as many of the nation's leading attorneys. Through its national office and its offices in Jackson, Mississippi and twelve other cities, the Lawyers' Committee has actively engaged the services of over a thousand members of the private bar in addressing legal problems in such areas as voting, education, employment, housing, and the administration of justice. The *amicus* has long been concerned about awards of attorneys' fees as an element of appropriate relief in actions affecting the rights of poor people and members of minority groups.

INTRODUCTION

This case involves one phase of the litigation concerning the desegregation of the Richmond public schools. The district court, as an element of relief granted to the successful plaintiffs, awarded attorneys' fees and taxed them against the defendant school board as part of costs. The Court of Appeals for the Fourth Circuit reversed, holding that the district court was powerless to make such an award.

The *amicus* believes that this is the first civil rights case ever in which an award of attorneys' fees by a district court has been reversed by a court of appeals. It is a case

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appropriate relief. It is
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fees, even when an awar
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ral well established justifications
which a district court has awarded
its duty to fashion effective and
a case in which a court of appeals
courts have the authority to go
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nces.

QUESTI ONS PRESENTED

1. Whether courts a
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plaintiffs in equitable actions where
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ARGUMENT

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's opinion is broad in scope and
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civil rights cases, labor cases, securities cases, environmental cases, consumer cases, and many other kinds of cases in which remedies not specifically set forth in statutes may be appropriate.

Decisions of this Court and other federal courts have stated two distinct grounds for equitable awards of attorneys' fees to successful plaintiffs in cases not involving contracts for the payment of attorneys' fees, statutes specifically authorizing awards of fees,[1] or improper conduct on the part of a litigant.[2] They can be called the "class benefit rationale" and the "full-and-appropriate-relief rationale." These two rationales are distinct, although their spheres of application overlap to some extent.

The class benefit rationale

The class benefit rationale originated in *Trustees* v. *Greenough*, a class action on behalf of bondholders against trustees of a fund which was pledged as security for their bonds. 105 U.S. 527 (1882). Plaintiff in that case alleged that the fund was being wasted and sought relief to pre-

[1] The petition for certiorari argues that a statutory provision for awarding attorneys' fees, Section 718 of the Emergency School Aid Act of 1972, is applicable to the instant case. Although the *amicus* agrees with this position, it wishes to focus on other aspects of the court of appeals' decision because it is primarily concerned about what it regards as even more fundamental and far-reaching errors which go to the very heart of the equity powers of the federal courts.

[2] The district court found, and petitioners maintain, that attorneys' fees were warranted, *inter alia*, because of defendants' obdurate obstinacy in the instant litigation. The court of appeals overturned the district court's finding of fact on this issue. The *amicus* is of the opinion that, in overturning the finding of the district court, the court of appeals exceeded the proper scope of appellate review and employed an incorrect standard for school boards' responsibility to desegregate public schools. For the reason indicated in note 1 above, however, the *amicus* does not wish to discuss these points, which are fully covered in the petition itself.

serve the fund as security for the bonds. This Court held that attorneys' fees should be awarded to the successful plaintiff on the following grounds:

> "It would be very hard on him to turn him away without any allowance except the paltry sum which could be taxed under the fee-bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution." *Id.* at 532.

In *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), this Court reaffirmed the rule of *Trustees* and extended it to cover cases which were not formally class actions, but which achieved results benefiting a class:

> "Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power

of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility." *Id.* at 166-7.

The awards of attorneys' fees to plaintiffs in *Trustees* and *Sprague* were not punitive and were not based on any wrongdoing on the part of defendants. Moreover, in practical effect, those awards were not true shifts of costs from one party-in-interest to another. The awarding of counsel fees out of funds produced or conserved by the actions was merely a device for preventing unjust enrichment by distributing the costs of litigation among its beneficiaries.

Mills v. *Electric Auto-Lite,* 396 U.S. 375 (1970), was a stockholders' derivative action under the Securities Exchange Act of 1934 alleging that the corporation had obtained stockholders' approval for a merger by means of a misleading proxy solicitation. Plaintiffs prevailed on the merits, and this Court held that the therapeutic service of bringing the corporation into compliance with the securities laws was a substantial benefit to the class of shareholders and warranted distributing the costs of the action over all the shareholders by taxing those costs against the defendant corporation. *Mills* extended the principles of *Trustees* and *Sprague* in two ways: *First,* it imposed the successful plaintiffs' legal costs directly upon the defendant, rather than on a fund held by the defendant, because the defendant's entire treasury was held for the benefit of the class benefiting from the action. *Second,* it specifically held that the class benefit rationale was not limited to cases involving the

creation or preservation of a pecuniary fund and extended to actions conferring non-pecuniary benefits as well:

> "The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses." *Id.* at 392.

Mills was followed by the Court of Appeals for the D. C. Circuit in *Yablonski* v. *United Mine Workers of America,* 466 F.2d 424 (D.C. Cir. 1972), *petition for cert. filed,* 41 U.S.L.W. 3350 (U.S. Nov. 1, 1972). In that case, which was not a class action, plaintiffs sued the union of which they were members for violations of LMRDA in connection with Yablonski's election bid for the presidency of the union. The district court denied plaintiffs' motion for attorneys' fees on the ground that the primary motive of the lawsuits was to facilitate Yablonski's candidacy, not to benefit the union. Reversing the denial of fees and rejecting this subjective standard, the court of appeals held that "The relevant question is whether or not the trouble he takes results in the actual conferring of benefits on others than himself." *Id.* at 431. The court of appeals also rejected the proposition that, in order to justify awarding attorneys' fees, the benefit to the class must be pecuniary:

> "The Supreme Court made clear in *Mills* that the judicial power to award counsel fees does not depend upon the

creation by the litigation in question of a fund from which such fees can be paid nor upon whether the benefit conferred is pecuniary in nature." *Id.* at 431, n. 10.

In *Hall* v. *Cole,* No. 72-630 (U.S., May 21, 1973), a case similar to *Yablonski,* this Court again approved the class benefit rationale and again applied it to a case in which the benefit conferred was therapeutic rather than pecuniary.

One of the grounds on which petitioners in the instant case seek an award of attorneys' fees is that their action benefited the same children, parents and citizens of Richmond for whose benefit the resources of the respondent Richmond school board are held. They argue that the taxing of attorneys' fees against the school board would serve to distribute the cost of the litigation over the class benefiting from it. The Court of Appeals for the Fourth Circuit acknowledged that *Mills* called for taxing attorneys' fees against defendants in cases where the defendant's resources are held for the benefit of the same class that benefits from the action (Pet. App. pp. 55a-58a). But the court would not apply the class benefit rationale to this case —presumably because the benefit conferred here was not "pecuniary."[3] The Fourth Circuit's requirement of a pe-

[3] The court of appeals opinion did not explicitly consider the application of the class benefit rationale to this case. However, the Fourth Circuit's opinion in *Brewer* v. *School Board of the City of Norfolk,* 456 F.2d 943 (4th Cir. 1972) (which was handed down a few months before its opinion in this case and was also written by Judge Russell) clearly states that court's requirement that a benefit be *pecuniary* in order to warrant the application of the class benefit rationale. *Id.* at 951-52. The only difference between *Brewer* and the instant case as far as the issue of attorneys' fees is concerned is that the benefit in *Brewer*—free transportation—could be characterized as being "pecuniary," whereas the benefit here—desegregation —is less susceptible to monetary evaluation. The Fourth Circuit granted attorneys' fees in *Brewer* and denied them here, thereby implicitly invoking its requirement of a pecuniary benefit.

cuniary benefit for the application of the class benefit rationale conflicts with the decisions of this Court in *Mills* and *Hall* and the decision of the D.C. Circuit in *Yablonski*.

The Full-and-Appropriate-Relief Rationale

Numerous decisions of this Court have held generally that where a right has been created by the Constitution or by statute, courts should exercise their equity powers to fashion relief that will be effective in enforcing that right and appropriate under the circumstances of the case. *Bell* v. *Hood*, 327 U.S. 678 (1946); *Deckert* v. *Independence Corp.*, 311 U.S. 282 (1940); *Mitchell* v. *DeMario Jewelry*, 361 U.S. 288 (1960); *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944); *Porter* v. *Warner Co.*, 328 U.S. 395 (1946); *Swann* v. *Board of Education*, 402 U.S. 1 (1971); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

> "... [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. at 684.

> "... [W]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of

> Equity a jurisdiction to . . . give effect to the policy of the legislature.' *Clark* v. *Smith,* 13 Pet. 195, 203." *Mitchell* v. *DeMario Jewelry,* 361 U.S. 288, 291-292 (1960).

Moreover, this Court held in *Virginian Ry.* v. *System Federation* that those equitable powers assume an even broader and more flexible character when the public interest, and not just a private controversy, is at stake. 300 U.S. 515 (1937).

In applying these general principles, this Court and other courts of appeals have held specifically that, where a Constitutional or statutory right is largely dependent on private litigation for its enforcement, courts should award attorneys' fees to successful plaintiffs in appropriate cases in order to prevent that right from becoming meaningless for lack of enforcement. *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968); *Mills* v. *Electric Auto-Lite, supra; Lee* v. *Southern Home Sites Corp.,* 444 F.2d 143 (5th Cir. 1971); *Cooper* v. *Allen,* 467 F.2d 836 (5th Cir. 1972); *Knight* v. *Auciello,* 453 F.2d 852 (1st Cir. 1972); *Donahue* v. *Staunton,* 471 F.2d 475 (7th Cir. 1972); *Gartner* v. *Soloner,* 384 F.2d 348 (3rd Cir. 1967); *Johnson* v. *Nelson,* 325 F.2d 646 (8th Cir. 1963); *Cole* v. *Hall,* 462 F.2d 777 (2d Cir. 1972), *aff'd,* No. 72-630 (U.S., May 21, 1973).

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. . . . Counsel fees in cases of this kind are not only appropriate, they are imperative to preserve the Congressional purpose. . . . Without counsel fees the grant of federal jurisdiction is but a gesture . . . ." *Cole* v. *Hall,* 462 F.2d 777, 780-81.

This doctrine is especially applicable where, as in the instant case, the litigation costs are high, the plaintiffs are poor, and the relief sought is injunctive. See *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972).

In reversing the district court's award in the case at bar, the Fourth Circuit held that, in the absence of explicit statutory authorization, courts are not permitted to award attorneys' fees as a means of providing effective enforcement for Constitutional or statutory public policy:

> "If, however, an award of attorneys' fees is to be made as a means of implementing public policy, as the District Court indicates in its exposition of its alternative ground of award, it must normally find its warrant for such action in statutory authority." (Pet. App. pp. 53a-54a)

> "We find ourselves in agreement with the conclusion that if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts." (Pet. App. p. 59a)

This holding is completely at odds with decisions of this Court as to when equitable awards may be granted:

> ". . . the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter* v. *Warner Co.*, 328 U.S. 395, 398 (1946).

It is true that this Court held in *Fleischman Corp.* v. *Maier Brewing Co.*, a case under the Lanham Act, that a clear Congressional intent to preclude awards of attorneys' fees in a certain area of law must be respected by the courts. 386 U.S. 714 (1967). However, in *Mills* this Court limited the *Fleischmann* holding to situations in which Congress had clearly "marked the boundaries of the power to award monetary relief" by providing a "meticulously detailed" pattern of statutory remedies. 396 U.S. at 391. It is one thing to say that the specific terms of a statute, its legislative history, or a "meticulously detailed" pattern of remedies may indicate a Congressional intent to prohibit awards of attorneys' fees. But it is something else to assert, as the court of appeals did in the instant case, that "when Congress omits to provide specially for the allowance of attorney's fees in a statutory scheme designed to further a public policy, it may be fairly accepted that it did so purposefully. . . ." (Pet. App. p. 58a)

42 U.S.C. § 1983 is a broad provision designed to create a general right of action to protect rights guaranteed by the Fourteenth Amendment. Its legislative history does not indicate a Congressional intent to preclude equitable awards of attorneys' fees.[4] Unlike the sections of the Lanham

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[4] If there can be any inference at all about what specific remedies Congress envisioned when it passed 42 U.S.C. § 1983, it would be that awards of attorneys' fees were contemplated. Section 1983 was originally section 1 of the Act of April 20, 1871, 17 Stat. 13. The original version of that section, after creating a cause of action, provided as follows:

> ". . . such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in

Act considered in *Fleischmann*, it is not part of a "meticulously detailed" pattern of remedies indicating a clear Congressional intent to preclude awards of fees. Furthermore, it cannot be maintained that provisions for attorneys' fees in sections of the Civil Rights Act of 1964 evince a Congressional intent to disallow awards of fees in suits under 42 U.S.C. § 1983. Congressional actions in 1964 are not

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their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases."

This was a clear direction to search as widely as possible for effective remedies, and especially to search among other remedies created by Congress in other civil rights laws. This command is reinforced by the reference to the Act of April 9, 1866 (14 Stat. 27), because the 1866 statute was largely concerned with seeking effective remedies. In following Congress' directions to seek remedies from among its own civil rights laws, one need look no further than a law passed 11 months earlier, the Act of May 31, 1870. 16 Stat. 140. This statute, designed to protect the right to vote, created civil causes of action in §§ 2, 3 and 4 and provided that offenders should

"forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the decision of the court."

The relationship of the Act of May 31, 1870, to the other civil rights statutes is further strengthened by the fact that § 16 of the Act of May 31, 1870, re-enacted a portion of § 1 of the Act of April 9, 1866 (now codified as 42 U.S.C. § 1981), and § 18 of the Act of May 31, 1870, explicitly re-enacted the entire Act of April 9, 1866.

Thus when Congress passed its statute on April 20, 1871, directing the courts to apply "other remedies provided in like cases" and "the other remedial laws of the United States which are in their nature applicable in such cases", it must have contemplated that one such remedy might be provision for counsel fees, which it had explicitly authorized in a civil rights law passed only 11 months before.

relevant to determining the intent of Congress in 1871, and the notion that statutory provisions for attorneys' fees in certain kinds of cases imply an intent to disallow awards of fees in other, similiar kinds of cases was rejected by this Court in *Mills* (396 U.S. at 390-91) and *Hall* (No. 72-630, pp. 9-10).

Conclusion

Plaintiffs are impecunious school children. They have successfully litigated an action which has benefited not only black school children, but white school children, parents and other citizens of Richmond. The beneficiaries of the action are the very class for whose benefit the resources of the Richmond school board are supposed to be used.[5] The action has enforced one of our most fundamental Constitutional and statutory policies—the right to equality in educational opportunity. The action arose in a statutory context in which private suits are an important means of enforcement. Moreover, as the district court said,

> ". . . this sort of case is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial . . . necessarily means that someone—plaintiff or lawyer—must make a great sacrifice unless equity intervenes." (Pet. App. p. 24a).

[5] The school board has expended a substantial sum in defending this action. It would be ironic indeed for the taxpayers to pay for opposition to desegregation required by law and for private parties to bear the burden of bringing the school district into compliance with the law.

When either the class benefit rationale or the full-and-appropriate-relief rationale is applicable, a court of equity should grant attorneys' fees to a successful private plaintiff, except where there is a clear Congressional intent to preclude such an award. In this case both the class benefit rationale and the full-and-appropriate-relief rationale apply, and there are no indications of a Congressional intent to preclude awards of fees. The district court, with its first-hand knowledge of the particular circumstances of this case, believed that attorneys' fees were necessary to provide "full and appropriate relief."

The court of appeals based its reversal of the district court's award on two grounds. One was explicit: Courts may not grant attorneys' fees on the basis of the full-and-appropriate-relief rationale without specific statutory authorization. The other was implicit: The class benefit rationale for awarding attorneys' fees does not apply unless the benefit to the class is pecuniary. Both these propositions are at odds with decisions of this Court and other courts of appeals.

The decision of the Fourth Circuit strikes at the heart of the equity powers of the courts. It would undermine a well established equitable device for preventing unjust enrichment, and it would restrict courts to a wooden application of explicit statutory remedies only. It would greatly impair the ability of the courts to deal fairly and flexibly with equitable claims and to provide effective protection for rights guaranteed by the Constitution and statutes of the United States.

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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